

1 Michael A. Caddell (SBN 249469)  
mac@caddellchapman.com  
2 Cynthia B. Chapman (SBN 164471)  
cbc@caddellchapman.com  
3 Amy E. Tabor (SBN 297660)  
aet@caddellchapman.com  
4 CADDELL & CHAPMAN  
P.O. Box 1311  
5 Monterey, CA 93942  
6 Tel.: (713) 751-0400  
Fax: (713) 751-0906

7 *Attorneys for Plaintiff*

8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10 EDWARD PEÑA and  
11 BRANDON MILLER,  
*individually and on behalf of*  
12 *persons similarly situated,*

13 *Plaintiffs,*

14 *v.*

15 INTERNATIONAL  
16 MEDICAL DEVICES, INC.,  
MENOVA  
17 INTERNATIONAL, INC.,  
18 GESIVA MEDICAL, LLC,  
JAMES J. ELIST, M.D., A  
19 MEDICAL CORPORATION,  
AND DR. JAMES ELIST,

20 *Defendants*

Case No. 2:22-cv-03391-SSS (RAOx)

**DISCOVERY MATTER**

**JOINT STIPULATION RE:  
DISCOVERY DISPUTE**

Class Certification Discovery Cut-Off:

January 17, 2024

Class Certification Hearing:

March 8, 2024

Pre-Trial Conference: N/A

Trial: N/A

Date: October 25, 2023

Time: 10:00 am

Ctrm: Courtroom 590, 5th Floor

Judge: Hon. Rozella A. Oliver

## TABLE OF CONTENTS

I. Introductory Statements.....	1
A. Plaintiff’s Introductory Statement.....	1
B. Defendants’ Introductory Statement .....	4
II. Issues in Dispute .....	5
A. Whether Discovery Is Stayed.....	5
1. Plaintiffs’ Position:.....	5
2. Defendants’ Position:.....	6
B. Privilege Logs.....	8
1. Plaintiffs’ Position:.....	8
2. Defendants’ Position:.....	9
C. Documents Produced in the <i>IMD v. Cornell Litigation</i> .....	10
1. Discovery Requests at Issue.....	10
2. Plaintiff’s Position .....	21
3. Defendant’s Position .....	22
D. Documents Regarding Dr. Elist’s California Board of Medicine Case .....	23
1. Discovery Requests at Issue.....	23
2. Plaintiff’s Position .....	25
3. Defendant’s Position .....	26
III. Conclusion .....	27

## I. INTRODUCTORY STATEMENTS

### A. Plaintiff's Introductory Statement

This case concerns a silicone penile implant, sold as the “Penuma,” which Defendants have developed and marketed for cosmetic penis enlargement. (*See* Pls.’ Third Am. Compl., attached as Exhibit 1.) Plaintiffs allege that Penuma is not safe and effective. (*Id.* ¶¶ 2-3, 67-78.) Instead of resulting in the larger, natural-looking penis Defendants’ marketing falsely promises, Penuma frequently causes scarring, resulting in the penis becoming shorter. (*Id.* ¶¶ 4, 56, 74-75.) Contrary to Defendants’ representations that the procedure is “reversible,” when complications require the implant to be removed, men are left permanently disfigured. (*Id.* ¶¶ 36, 56, 76.) Plaintiffs further allege Defendants misleadingly advertised Penuma as “FDA-cleared” to imply that the FDA has tested Penuma and determined that it is safe and effective, when in fact the FDA has not done any safety and effectiveness testing on Penuma. (*Id.* ¶¶ 3, 50.) Plaintiffs bring their claims on behalf of a Class of similarly situated persons whose Penuma procedures were performed by Dr. James Elist from May 19, 2018, through the date of certification. (*Id.* ¶¶ 92-93.)

Plaintiff filed his Original Complaint on May 19, 2022. (Dkt. 1.) On August 1, 2022, Defendants moved to dismiss. (Dkt. 31.) On September 9, 2022, Plaintiff Edward Peña served his first set of Requests for Production, Interrogatories, and Requests for Admission. On October 11, 2022, Defendants responded to this discovery, asserting a blanket objection to any discovery taking place based on the fact that a Rule 26(f) conference had not yet occurred. On January 10, 2023, the Court denied Defendants’ motion to dismiss as to Plaintiff’s legal claims and granted the motion as to Plaintiff’s equitable claims without prejudice, allowing leave to amend. (Dkt. 50.) Plaintiff filed his Second Amended Complaint, adding allegations regarding his equitable claims, on January 20, 2023. (Dkt. 51.) Defendants again moved to dismiss the equitable claims. (Dkt. 53.) On April 17, 2023, the Court

1 denied Defendants' second motion to dismiss. (Dkt. 61.)

2 On April 3, 2023, the parties met and conferred regarding the sufficiency of  
3 Defendants' discovery responses. On April 11, 2023, the parties held a Rule 26(f)  
4 conference. On May 11, 2023, Defendants filed their amended objections and  
5 responses to Plaintiff's first set of written discovery, raising numerous objections  
6 and also offering to produce certain documents subject to a protective order. On May  
7 26, 2023, Defendants produced documents Bates numbered PENU\_0000001–  
8 0000279, stating that they would make a further production of confidential  
9 documents following the entry of a protective order. The Court entered a stipulated  
10 protective order on August 4, 2023. (Dkt. 76.) Defendants still have not produced  
11 the confidential documents.

12 The parties submitted a Joint Rule 26 Report on July 7, 2023. Based on the  
13 parties' written report, the Court established a class certification briefing schedule  
14 requiring Plaintiffs to file their Motion for Class Certification by January 17, 2024  
15 and setting a hearing on the Motion for Class Certification for March 8, 2024. (Dkt.  
16 73.) The Court has not yet set deadlines for the Pre-Trial Conference and Trial. On  
17 July 19, 2023, Plaintiffs filed their Third Amended Complaint. (Dkt. 71.) On August  
18 7, 2023, Defendants filed a motion to compel arbitration and to stay discovery, which  
19 was noticed for hearing on September 29, 2023. (Dkt. 77.) Defendants served their  
20 answer to the Third Amended Complaint on August 14, 2023. (Dkt. 78.) On  
21 September 21, 2023, the Court continued the hearing on Defendants' Motion to  
22 Compel Arbitration until October 27, 2023. (Dkt. 81.)

23 On July 5, 2023, Plaintiff's counsel sent defense counsel a list of proposed  
24 search terms for electronically stored information ("ESI") and met and conferred  
25 with defense counsel about the search terms on July 7, 2023. On that telephone call,  
26 defense counsel stated that he would speak to Defendants and respond with a  
27 counter-proposal regarding the ESI search terms. By letter dated August 8, 2023,

1 Plaintiffs counsel identified 12 disputed discovery issues based on Defendants'  
2 written objections and responses to Plaintiff's first set of written discovery and  
3 notified Defendants' counsel, pursuant to Local Rule 37-1, of each disputed  
4 discovery request and Plaintiff's position on each issue and request, including a  
5 number of proposals for narrowing the requests.

6 On August 21 and 22, Plaintiffs' counsel and Defendants' counsel met and  
7 conferred by telephone regarding the disputed discovery issues. On those telephone  
8 calls, they were able to reach tentative agreement as to a number of issues, subject  
9 to defense counsel's consultation with Defendants and Mr. Mallow, who was not  
10 able to attend the call. Defense counsel also responded on August 21, 2023 with their  
11 counter-proposal regarding ESI search terms, and the parties agreed that the counter-  
12 proposal was a good starting point for searching Defendants' ESI, subject to a  
13 validation process. Defendants' counsel, however, took the position that Defendants  
14 would not make any formal production, including even of documents that  
15 Defendants had offered to produce subject to the protective order in their written  
16 discovery responses served on May 11, while their Motion to Compel Arbitration  
17 remained pending. Defendants also refused to produce a privilege log.

18 On September 17, 2023, Plaintiffs' counsel followed up by email with defense  
19 counsel, seeking to confirm their tentative agreement to withdraw certain objections  
20 and respond to certain narrowed requests, as well as to confirm that the parties were  
21 at an impasse with regard to Defendants' request for a discovery stay and the  
22 privilege log issue. Plaintiffs' counsel also asked Defendants whether they would  
23 agree to use Magistrate Judge Oliver's Informal Discovery Dispute Resolution  
24 procedures to resolve any issues on which the parties were not able to reach  
25 agreement. Defendants confirmed the parties' agreements on several of the disputed  
26 issues and elected to return this Joint Stipulation with their position on the issues  
27 that remain in dispute.

## 1      **B. Defendants' Introductory Statement**

2            This case remains at an early stage. As Plaintiffs note, the parties only recently  
 3 held their Rule 26(f) conference, and Plaintiffs' now-operative Third Amended  
 4 Complaint, which added a named Plaintiff (Plaintiff Brandon Miller joined Plaintiff  
 5 Edward Peña), a new putative subclass, and new allegations, was only filed on July  
 6 19, 2023. *See* Dkt. 71. While Plaintiffs are correct that the Court has set 2024  
 7 deadlines for class certification discovery and briefing, their implication that these  
 8 deadlines require immediate action from the Court is not. If the Court grants  
 9 Defendants' Motion to Compel Arbitration and Stay Proceedings, then discovery  
 10 will proceed in the arbitration proceedings for Peña's and Miller's individual claims.  
 11 If that motion were denied, it would be Defendants' intent to pursue an interlocutory  
 12 appeal that would require a stay while the appeal remained pending. *See Coinbase,*  
 13 *Inc. v. Bielski*, 599 U.S. 736, 10, 143 S. Ct. 1915, 1923, 216 L. Ed. 2d 671 (2023).  
 14 To the extent any of the issues raised by Plaintiffs require the Court's involvement,  
 15 they should be heard following the Court's decision on the fully-briefed Motion to  
 16 Compel Arbitration and Stay Proceedings, to conserve the Court's and the parties'  
 17 resources and avoid inconsistent rulings.<sup>1</sup> Indeed, the issue of whether discovery  
 18 should be stayed pending a ruling on Defendants' Motion to Compel Arbitration is  
 19 already pending before Judge Sykes, yet Plaintiffs apparently intend to put the same  
 20 issue before Magistrate Judge Oliver.

21            Plaintiffs' Introduction refers to discovery disputes that were never disputes  
 22 at all, including those related to requests or issues the parties never conferred upon  
 23 as required by Local Rule 37.1. The majority of these were withdrawn by Plaintiffs  
 24 after Defendants edited this document to identify the issues that had already been  
 25

26            <sup>1</sup> Defendants note that they agreed to extend the briefing schedule on the Motion to  
 27 Compel Arbitration and Stay Proceedings to accommodate Plaintiffs' counsel's  
 28 vacation. Otherwise, the Motion may have already been heard and ruled upon.

resolved and those that were never the subject of any conference. The issues that remain relate to a clear misreading of the Stipulated Protective Order in this case, and Plaintiffs' decision to serve (and failure to narrow) overly broad, duplicative, and overlapping requests for documents related to other matters that do not involve the claims and defenses in this case. Plaintiffs ask the Court for an Order compelling Defendants to withdraw valid objections to those overbroad and irrelevant requests and to produce documents within 30 days, despite the fact that discovery<sup>2</sup> in this case will almost certainly be stayed when Defendants' Motion to Compel Arbitration and Stay Proceedings (*See* Dkt. 77, 80) is either granted or denied. The Court should deny all relief sought by Plaintiffs, and should defer consideration of the issues Plaintiffs raise while it considers Defendants' Motion to Compel Arbitration.

## II. ISSUES IN DISPUTE

### A. Whether Discovery Is Stayed

#### 1. Plaintiffs' Position:

The Court has not stayed discovery in this action, and all case deadlines, including Plaintiffs' deadline to file their Motion for Class Certification on January 17, 2024, remain in effect. Unless the Court issues a stay or takes that deadline off calendar, Plaintiffs understand that it is their responsibility to be prepared to file their Motion for Class Certification on January 17. In order to do so, they need to receive Defendants' production of documents relevant to class certification as soon as possible.

The parties made substantial progress on a number of discovery issues at their meet-and-confer discussions on August 21–22, including reaching agreements to narrow a number of requests and an agreement to an initial list of ESI search terms, subject to a validation process. While Defendants' counsel has cited *Coinbase, Inc.*

<sup>2</sup> Merits discovery is already stayed; only class certification discovery is permitted at this stage. *See* Dkt. 73 at 2.



1 *v. Bielski*, 1443 S. Ct. 1915 (June 23, 2023) in support of staying discovery,  
 2 *Coinbase* is limited to whether discovery should be stayed while denial of a motion  
 3 to compel arbitration is on appeal. Nothing in *Coinbase* prevents discovery from  
 4 continuing while a motion to compel arbitration is pending. Furthermore,  
 5 Defendants brought two Motions to Dismiss and delayed for over a year before  
 6 seeking to compel arbitration just as discovery was finally getting underway. Not  
 7 only did this long delay waive any right to arbitrate, (*see* Dkt 79 at 2–6), Defendants  
 8 are not signatories to the arbitration agreements they are attempting to enforce, and  
 9 the agreements are on their faces limited to “medical malpractice” disputes, not false  
 10 advertising and consumer fraud cases like this one. (*Id.* at 7–12.) Such a groundless  
 11 motion should not delay the progress of discovery in this case.

## 12 **2. Defendants’ Position:**

13 Consistent with authority in this district and the United States Supreme  
 14 Court’s recent decision in *Coinbase v. Bielski*, discovery should be stayed while  
 15 Defendants’ Motion to Compel Arbitration and Stay Proceedings is pending.  
 16 *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 6, 143 S. Ct. 1915, 1921, 216 L. Ed. 2d 671  
 17 (2023). For starters, courts routinely stay discovery while motions to compel  
 18 arbitration are pending. *See, e.g., Galaxia Elecs. Co. v. Luxmax U.S.A.*, No. LA  
 19 CV16-05144-JAK (GJSx), 2017 WL 11566394, at \*2 (C.D. Cal. Dec. 28, 2017)  
 20 (noting that Ninth Circuit courts “routinely grant motions to stay discovery under  
 21 similar circumstances”); *Mahamedi IP Law, LLP v. Paradise & Li, LLP*, No. 5:16-  
 22 CV-02805-EJD, 2017 WL 2727874, at \*1 (N.D. Cal. Feb. 14, 2017) (granting  
 23 defendant’s motion to stay discovery as to the plaintiff and third parties); *Stiener v.*  
 24 *Apple Computer, Inc.*, No. C 07-4486-SBA, 2007 WL 4219388, at \*1 (N.D. Cal.  
 25 Nov. 29, 2007) (“In the interests of conserving the resources of the parties, a short  
 26 stay of ... discovery pending the determination of the motion to compel arbitration  
 27 is therefore prudent.”); *Jones v. Deutsche Bank AG*, No. C 04-5357-FW-RS, 2007



1 WL 951811, at \*1 (N.D. Cal. Mar. 28, 2007) (“issues of policy and expediency ...  
2 ordinarily support” granting a motion to stay discovery pending a ruling on a  
3 defendant’s motion to compel arbitration). There is no reason to depart from this  
4 routine practice.

5 *Coinbase* reinforces the appropriateness of such a stay. In *Coinbase*, the  
6 Supreme Court reversed the Ninth Circuit and held that “the District Court was  
7 required to stay its proceedings,” during the interlocutory appeal of the denial of a  
8 motion to compel arbitration. *Id.* at 1923. As the Supreme Court noted, “If the district  
9 court could move forward with pre-trial and trial proceedings while the appeal on  
10 arbitrability was ongoing, then many of the asserted benefits of arbitration  
11 (efficiency, less expense, less intrusive discovery, and the like) would be  
12 irretrievably lost—even if the court of appeals later concluded that the case actually  
13 had belonged in arbitration all along.” *Id.* at 1921. In addition, not staying the case  
14 pending the appeal, “creates the possibility that the district court will waste scarce  
15 judicial resources—which could be devoted to other pressing criminal or civil  
16 matters—on a dispute that will ultimately head to arbitration in any event.” *Id.*  
17 According the Supreme Court, “That scenario represents the ‘worst possible  
18 outcome’ for parties and the courts: litigating a dispute in the district court only for  
19 the court of appeals to “reverse and order the dispute arbitrated.” *Id.* These same  
20 principles support staying discovery while Defendants’ motion to compel arbitration  
21 is pending. Absent a stay, the benefits of arbitration will be lost and the court may  
22 be forced to spend scarce resources resolving discovery disputes in a case that does  
23 not belong in this Court. Contrary to Plaintiffs’ claims, and as set out in Defendants’  
24 briefing on its Motion to Compel Arbitration, (1) Defendants are parties or third  
25 parties entitled to enforce the arbitration agreements at issue; (2) Plaintiffs’ claims  
26 are within the scope of those agreements; and (3) Defendants have not waived their  
27 right to arbitrate those claims. *See* Dkt. 77, 80.

1 Plaintiffs’ concern about the January 17, 2024 class discovery deadline is  
 2 misplaced. This case will soon be stayed *regardless* of the outcome of Defendants’  
 3 Motion to Compel, as another court recognized in identical circumstances. Relying  
 4 on *Coinbase*, the United States District Court for the Southern District of Florida  
 5 recently noted that “it was *either* going to grant the Motion to Compel [Arbitration]  
 6 or Dismiss, in which case the litigation will be stayed *or* [it was] going to deny the  
 7 Motion to Compel or Dismiss in which case [Defendants will] take an interlocutory  
 8 appeal—thus again requiring a stay of the whole case.”<sup>3</sup> *Sizemore v. Zhao*, No. 23-  
 9 CV-21261, 2023 WL 5087341, at \*2 (S.D. Fla. Aug. 8, 2023) (emphasis in original).  
 10 Thus, the District Court stayed all discovery, concluding that such a stay “makes  
 11 sense,” pending the disposition of the motion to compel arbitration. *Id.*

12 Finally, whether discovery and all other proceedings should be stayed in this  
 13 case are the subject of Defendants’ fully-briefed Motion to Compel Arbitration and  
 14 Stay Proceedings, which is set for hearing before Judge Sykes on October 27, 2023.  
 15 (Dkt. 81). In fact, Plaintiffs made substantially the same arguments they make above  
 16 in their September 5, 2023 Opposition to Defendants’ Motion. (Dkt. 79 at 18–19).  
 17 Deciding the same issue in this context before it is ruled on by Judge Sykes would  
 18 waste the Court’s and the parties’ resources and risk inconsistent rulings.

## 19 **B. Privilege Logs**

### 20 **1. Plaintiffs’ Position:**

21 The Stipulated Protective Order, provides that “[a] privilege log shall be  
 22 served by any Party withholding responsive documents on the basis of privilege or  
 23 work product protection on a rolling basis within forty-nine (49) days after the  
 24 production from which it is withheld.” (Dkt. 76 at 12–13.) Defendants objected to  
 25

26 <sup>3</sup> Similarly, here, Defendants informed Plaintiff’s counsel during the parties’ August  
 27 meet and confer that Defendants intended to pursue an interlocutory appeal should  
 28 the pending Motion to Compel Arbitration—which is set to be heard in less than a  
 month—be denied.

1 numerous requests based on attorney-client privilege in their written responses  
2 served on May 11, 2023 and withheld such documents from their production on May  
3 26, 2023. Their privilege log thus should have been produced, under the Stipulated  
4 Protective Order, by July 14, 2023. Plaintiffs raised this issue in their meet-and-  
5 confer letter on August 4, 2023, and at the conference of counsel offered to extend  
6 the time for logging privileged documents if Defendants would commit to a date  
7 certain by which they would produce a privilege log, but Defendants refused to do  
8 so. The Court should therefore compel Defendants to produce any documents  
9 withheld based on privilege objections within 30 days.

## 10 **2. Defendants' Position:**

11 First, for the reasons set forth above, the Court should defer consideration of  
12 this issue while it considers Defendants' Motion to Compel Arbitration.

13 Next, Defendants have not produced privilege logs because they have not yet  
14 made productions from which privileged or protected documents were withheld. The  
15 Stipulated Protective Order contemplates multiple or rolling productions of  
16 documents, and provides that privilege logs must be served "within forty-nine (49)  
17 days *after the production from which it is withheld.*" (Dkt. 76 at 12–13). Defendants'  
18 May 26, 2023 production consisted of: articles of incorporation or organization for  
19 entity defendants; business filings with the California and Minnesota Secretaries of  
20 State; corporate bylaws, resolutions, and meeting minutes; an organizational chart  
21 for International Medical Devices, Inc.; published literature related to Penuma; and  
22 certain adverse event reports submitted to FDA related to Penuma. None of those  
23 discrete collections included work-product protected material or privileged  
24 communications. Because there were no documents withheld as privileged or  
25 protected from the May 26, 2023 production, there was no requirement that  
26 Defendants serve a privilege log. As the remainder of Plaintiffs' portions of this Joint  
27 Discovery Stipulation makes clear, should discovery proceed in this case rather than  
28

1 in individual arbitrations with Plaintiff Pena and Plaintiff Miller, there are certain  
 2 categories of documents that Defendants would produce to Plaintiffs, including  
 3 collections of communications from which privileged and work-product protected  
 4 materials would be withheld. If and when those productions are made in this case,  
 5 Defendants will, of course, produce a privilege log within 49 days of each such  
 6 production, as the Stipulated Protective Order requires.

### 7 **C. Documents Produced in the *IMD v. Cornell* Litigation**

#### 8 **1. Discovery Requests at Issue**

9 The following requests, set forth below with Defendants' responses, all  
 10 concern documents produced in a related case, *International Medical Devices, Inc.*  
 11 *et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

12 **REQUEST FOR PRODUCTION No. 1 to Dr. James Elist:** All documents  
 13 produced in *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*,  
 14 No. 2:20-cv-03503-CMB (RAOx).

15 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
 16 following reasons.

17 First, the Request is not relevant to issues related to certification of the  
 18 putative class defined in Plaintiffs' Complaint.

19 Second, the Request seeks documents that are not relevant to the claims and  
 20 defenses in this case, and that a search for such documents would not be proportional  
 21 to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks  
 22 documents related to *International Medical Devices, Inc. et al. v. Robert Cornell,*  
 23 *MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) ("*Cornell*"), a civil matter related to  
 24 the misappropriation of trade secrets, copyright and trademark infringement, and  
 25 contractual claims, among other claims. *Cornell* does not involve the issues here  
 26 related to product- and marketing-related claims that Plaintiff alleges were false or  
 27 misleading, and this case does not involve the contracts and interactions with the

1 defendants in *Cornell* at issue there. *See, e.g.*, May 31, 2022 Order Denying Transfer  
2 Pursuant to General Order 21-01 (Doc. No. 12) (finding that *Cornell* “is a  
3 misappropriation case against a doctor,” while this case “is a false advertising and  
4 unfair competition case filed by a class of medical patients against International  
5 Medical Devices, Inc.” and that “[t]he parties and claims of each case are  
6 dissimilar[.]”).

7 **REQUEST FOR PRODUCTION No. 2 to Dr. James Elist:** All transcripts  
8 and recordings of depositions taken in *International Medical Devices, Inc. et al. v.*  
9 *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

10 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
11 following reasons.

12 First, the Request is not relevant to issues related to certification of the  
13 putative class defined in Plaintiffs’ Complaint.

14 Second, the Request seeks documents that are not relevant to the claims and  
15 defenses in this case, and that a search for such documents would not be proportional  
16 to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks  
17 documents related to depositions in *International Medical Devices, Inc. et al. v.*  
18 *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil  
19 matter related to the misappropriation of trade secrets, copyright and trademark  
20 infringement, and contractual claims, among other claims. *Cornell* does not involve  
21 the issues here related to product- and marketing-related claims that Plaintiff alleges  
22 were false or misleading, and this case does not involve the contracts and interactions  
23 with the defendants in *Cornell* at issue there. *See, e.g.*, May 31, 2022 Order Denying  
24 Transfer Pursuant to General Order 21-01 (Doc. No. 12) (finding that *Cornell* “is a  
25 misappropriation case against a doctor,” while this case “is a false advertising and  
26 unfair competition case filed by a class of medical patients against International  
27

1 Medical Devices, Inc.” and that “[t]he parties and claims of each case are  
2 dissimilar[.]”).

3 **REQUEST FOR PRODUCTION No. 3 to Dr. James Elist:** All written  
4 discovery served in *International Medical Devices, Inc. et al. v. Robert Cornell, MD,*  
5 *et al.*, No. 2:20-cv-03503-CMB (RAOx).

6 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
7 following reasons.

8 First, the Request is not relevant to issues related to certification of the  
9 putative class defined in Plaintiffs’ Complaint.

10 Second, the Request seeks documents related to written discovery served in  
11 another matter that are not relevant to the claims and defenses in this case, and that  
12 a search for such documents would not be proportional to the needs of this case. Fed.  
13 R. Civ. P. 26(b). First, even if the issues in another matter were relevant to the issues  
14 in this case, the written discovery propounded by a party to that other matter would  
15 not be relevant to any claim or defense in this case. Further, the Request seeks  
16 documents related to written discovery in *International Medical Devices, Inc. et al.*  
17 *v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil  
18 matter related to the misappropriation of trade secrets, copyright and trademark  
19 infringement, and contractual claims, among other claims, that are not relevant here.  
20 *Cornell* does not involve the issues here related to product- and marketing-related  
21 claims that Plaintiff alleges were false or misleading, and this case does not involve  
22 the contracts and interactions with the defendants in *Cornell* at issue there. *See, e.g.*,  
23 May 31, 2022 Order Denying Transfer Pursuant to General Order 21-01 (Doc. No.  
24 12) (finding that *Cornell* “is a misappropriation case against a doctor,” while this  
25 case “is a false advertising and unfair competition case filed by a class of medical  
26 patients against International Medical Devices, Inc.” and that “[t]he parties and  
27 claims of each case are dissimilar[.]”).



1           **REQUEST FOR PRODUCTION No. 1 to Dr. James J. Elist, M.D., a**  
 2           **Medical Corporation:** All documents produced in *International Medical Devices,*  
 3           *Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

4           **AMENDED RESPONSE:** Subject to and without waiving its objections,  
 5           Defendant states that it is not a party to *International Medical Devices, Inc. et al. v.*  
 6           *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), and  
 7           therefore has no documents responsive to this Request.

8           Further responding, to the extent Plaintiff seeks additional searches or  
 9           production of documents, Defendant objects to the Request, for the following  
 10          reasons.

11          First, the Request is not relevant to issues related to certification of the  
 12          putative class defined in Plaintiffs’ Complaint.

13          Second, the Request seeks documents that are not relevant to the claims and  
 14          defenses in this case, and a search for such documents would not be proportional to  
 15          the needs of this case. Specifically, the Request seeks documents related to a civil  
 16          matter related to the misappropriation of trade secrets, copyright and trademark  
 17          infringement, and contractual claims, among other claims. *Cornell* does not involve  
 18          the issues here related to product- and marketing-related claims that Plaintiff alleges  
 19          were false or misleading, and this case does not involve the contracts and interactions  
 20          with the defendants in *Cornell* at issue there. See, e.g., May 31, 2022 Order Denying  
 21          Transfer Pursuant to General Order 21-01 (Doc. No. 12) (finding that *Cornell* “is a  
 22          misappropriation case against a doctor,” while this case “is a false advertising and  
 23          unfair competition case filed by a class of medical patients against International  
 24          Medical Devices, Inc.” and that “[t]he parties and claims of each case are  
 25          dissimilar[.]”).

26          **REQUEST FOR PRODUCTION No. 2 to Dr. James J. Elist, M.D., a**  
 27          **Medical Corporation:** All transcripts and recordings of depositions taken in



1 *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-  
2 cv-03503-CMB (RAOx).

3 **AMENDED RESPONSE:** Subject to and without waiving its objections,  
4 Defendant states that it is not a party to *International Medical Devices, Inc. et al. v.*  
5 *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), and  
6 therefore has no documents responsive to this Request.

7 Further responding, to the extent Plaintiff seeks additional searches or  
8 production of documents, Defendant objects to the Request, for the following  
9 reasons.

10 First, the Request is not relevant to issues related to certification of the  
11 putative class defined in Plaintiffs’ Complaint.

12 Second, the Request seeks documents related to depositions taken in another  
13 matter that are not relevant to the claims and defenses in this case, and that a search  
14 for such documents would not be proportional to the needs of this case. Fed. R. Civ.  
15 P. 26(b). Specifically, the Request seeks documents related to depositions in  
16 *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-  
17 cv-03503-CMB (RAOx) (“*Cornell*”), a civil matter related to the misappropriation  
18 of trade secrets, copyright and trademark infringement, and contractual claims,  
19 among other claims. *Cornell* does not involve the issues here related to product- and  
20 marketing-related claims that Plaintiff alleges were false or misleading, and this case  
21 does not involve the contracts and interactions with the defendants in *Cornell* at issue  
22 there. See, e.g., May 31, 2022 Order Denying Transfer Pursuant to General Order  
23 21-01 (Doc. No. 12) (finding that *Cornell* “is a misappropriation case against a  
24 doctor,” while this case “is a false advertising and unfair competition case filed by a  
25 class of medical patients against International Medical Devices, Inc.” and that “[t]he  
26 parties and claims of each case are dissimilar[.]”).

1           **REQUEST FOR PRODUCTION No. 3 to Dr. James J. Elist, M.D., a**  
 2           **Medical Corporation:** All written discovery served in *International Medical*  
 3           *Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

4           **AMENDED RESPONSE:** Subject to and without waiving its objections,  
 5           Defendant states that it is not a party to *International Medical Devices, Inc. et al. v.*  
 6           *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), and  
 7           therefore has no documents responsive to this Request.

8           Further responding, to the extent Plaintiff seeks additional searches or  
 9           production of documents, Defendant objects to the Request, for the following  
 10          reasons.

11          First, the Request is not relevant to issues related to certification of the  
 12          putative class defined in Plaintiffs’ Complaint.

13          Second, the Request seeks documents related to written discovery served in  
 14          another matter that are not relevant to the claims and defenses in this case, and that  
 15          a search for such documents would not be proportional to the needs of this case. Fed.  
 16          R. Civ. P. 26(b). Even if the issues in another matter were relevant to the issues in  
 17          this case, the written discovery propounded by a party to that other matter would not  
 18          be relevant to any claim or defense in this case. The Request seeks documents related  
 19          to written discovery in *International Medical Devices, Inc. et al. v. Robert Cornell,*  
 20          *MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil matter related to  
 21          the misappropriation of trade secrets, copyright and trademark infringement, and  
 22          contractual claims, among other claims, that are not relevant here. *Cornell* does not  
 23          involve the issues here related to product- and marketing-related claims that Plaintiff  
 24          alleges were false or misleading, and this case does not involve the contracts and  
 25          interactions with the defendants in *Cornell* at issue there. See, e.g., May 31, 2022  
 26          Order Denying Transfer Pursuant to General Order 21-01 (Doc. No. 12) (finding that  
 27          *Cornell* “is a misappropriation case against a doctor,” while this case “is a false  
 28

1 advertising and unfair competition case filed by a class of medical patients against  
2 International Medical Devices, Inc.” and that “[t]he parties and claims of each case  
3 are dissimilar[.]”).

4 **REQUEST FOR PRODUCTION No. 1 to International Medical Devices,**  
5 **Inc.:** All documents produced in *International Medical Devices, Inc. et al. v. Robert*  
6 *Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

7 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
8 following reasons.

9 First, the Request is not relevant to issues related to certification of the  
10 putative class defined in Plaintiffs’ Complaint.

11 Second, the Request seeks documents that are not relevant to the claims and  
12 defenses in this case, and that a search for such documents would not be proportional  
13 to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks  
14 documents related to *International Medical Devices, Inc. et al. v. Robert Cornell,*  
15 *MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil matter related to  
16 the misappropriation of trade secrets, copyright and trademark infringement, and  
17 contractual claims, among other claims. *Cornell* does not involve the issues here  
18 related to product- and marketing-related claims that Plaintiff alleges were false or  
19 misleading, and this case does not involve the contracts and interactions with the  
20 defendants in *Cornell* at issue there. See, e.g., May 31, 2022 Order Denying Transfer  
21 Pursuant to General Order 21-01 (Doc. No. 12) (finding that *Cornell* “is a  
22 misappropriation case against a doctor,” while this case “is a false advertising and  
23 unfair competition case filed by a class of medical patients against International  
24 Medical Devices, Inc.” and that “[t]he parties and claims of each case are  
25 dissimilar[.]”).

1           **REQUEST FOR PRODUCTION No. 2 to International Medical Devices,**  
2 **Inc.:** All transcripts and recordings of depositions taken in *International Medical*  
3 *Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

4           **AMENDED RESPONSE:** Defendant objects to this Request, for the  
5 following reasons.

6           First, the Request is not relevant to issues related to certification of the  
7 putative class defined in Plaintiffs' Complaint.

8           Second, the Request seeks documents related to depositions taken in another  
9 matter that are not relevant to the claims and defenses in this case, and that a search  
10 for such documents would not be proportional to the needs of this case. Fed. R. Civ.  
11 P. 26(b). Specifically, the Request seeks documents related to depositions in  
12 *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-  
13 cv-03503-CMB (RAOx) ("*Cornell*"), a civil matter related to the misappropriation  
14 of trade secrets, copyright and trademark infringement, and contractual claims,  
15 among other claims. *Cornell* does not involve the issues here related to product- and  
16 marketing-related claims that Plaintiff alleges were false or misleading, and this case  
17 does not involve the contracts and interactions with the defendants in *Cornell* at issue  
18 there. See, e.g., May 31, 2022 Order Denying Transfer Pursuant to General Order  
19 21-01 (Doc. No. 12) (finding that *Cornell* "is a misappropriation case against a  
20 doctor," while this case "is a false advertising and unfair competition case filed by a  
21 class of medical patients against International Medical Devices, Inc." and that "[t]he  
22 parties and claims of each case are dissimilar[.]").

23           **REQUEST FOR PRODUCTION No. 3 to International Medical Devices,**  
24 **Inc.:** All written discovery served in *International Medical Devices, Inc. et al. v.*  
25 *Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

26           **AMENDED RESPONSE:** Defendant objects to this Request, for the  
27 following reasons.

1 First, the Request is not relevant to issues related to certification of the  
2 putative class defined in Plaintiffs' Complaint.

3 Second, the Request seeks documents related to written discovery served in  
4 another matter that are not relevant to the claims and defenses in this case, and that  
5 a search for such documents would not be proportional to the needs of this case. Fed.  
6 R. Civ. P. 26(b). First, even if the issues in another matter were relevant to the issues  
7 in this case, the written discovery propounded by a party to that other matter would  
8 not be relevant to any claim or defense in this case. Further, the Request seeks  
9 documents related to written discovery in *International Medical Devices, Inc. et al.*  
10 *v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) ("*Cornell*"), a civil  
11 matter related to the misappropriation of trade secrets, copyright and trademark  
12 infringement, and contractual claims, among other claims, that are not relevant here.  
13 *Cornell* does not involve the issues here related to product- and marketing-related  
14 claims that Plaintiff alleges were false or misleading, and this case does not involve  
15 the contracts and interactions with the defendants in *Cornell* at issue there. See, e.g.,  
16 May 31, 2022 Order Denying Transfer Pursuant to General Order 21-01 (Doc. No.  
17 12) (finding that *Cornell* "is a misappropriation case against a doctor," while this  
18 case "is a false advertising and unfair competition case filed by a class of medical  
19 patients against International Medical Devices, Inc." and that "[t]he parties and  
20 claims of each case are dissimilar[.]").

21 **REQUEST FOR PRODUCTION No. 1 to Menova International, Inc.:**

22 All documents produced in *International Medical Devices, Inc. et al. v. Robert*  
23 *Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

24 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
25 following reasons.

26 First, the Request is not relevant to issues related to certification of the  
27 putative class defined in Plaintiffs' Complaint.

Second, the Request seeks documents that are not relevant to the claims and defenses in this case, and that a search for such documents would not be proportional to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks documents related to *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil matter related to the misappropriation of trade secrets, copyright and trademark infringement, and contractual claims, among other claims. *Cornell* does not involve the issues here related to product- and marketing-related claims that Plaintiff alleges were false or misleading, and this case does not involve the contracts and interactions with the defendants in *Cornell* at issue there. See, e.g., May 31, 2022 Order Denying Transfer Pursuant to General Order 21-01 (Doc. No. 12) (finding that *Cornell* “is a misappropriation case against a doctor,” while this case “is a false advertising and unfair competition case filed by a class of medical patients against International Medical Devices, Inc.” and that “[t]he parties and claims of each case are dissimilar[.]”).

**REQUEST FOR PRODUCTION No. 2 to Menova International, Inc.:**

All transcripts and recordings of depositions taken in *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

**AMENDED RESPONSE:** Defendant objects to this Request, for the following reasons.

First, the Request is not relevant to issues related to certification of the putative class defined in Plaintiffs’ Complaint.

Second, the Request seeks documents related to depositions taken in another matter that are not relevant to the claims and defenses in this case, and that a search for such documents would not be proportional to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks documents related to depositions in *International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-

1 cv-03503-CMB (RAOx) (“*Cornell*”), a civil matter related to the misappropriation  
 2 of trade secrets, copyright and trademark infringement, and contractual claims,  
 3 among other claims. *Cornell* does not involve the issues here related to product- and  
 4 marketing-related claims that Plaintiff alleges were false or misleading, and this case  
 5 does not involve the contracts and interactions with the defendants in *Cornell* at issue  
 6 there. See, e.g., May 31, 2022 Order Denying Transfer Pursuant to General Order  
 7 21-01 (Doc. No. 12) (finding that *Cornell* “is a misappropriation case against a  
 8 doctor,” while this case “is a false advertising and unfair competition case filed by a  
 9 class of medical patients against International Medical Devices, Inc.” and that “[t]he  
 10 parties and claims of each case are dissimilar[.]”).

11 **REQUEST FOR PRODUCTION No. 3 to Menova International, Inc.:**  
 12 All written discovery served in *International Medical Devices, Inc. et al. v. Robert*  
 13 *Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx).

14 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
 15 following reasons.

16 First, the Request is not relevant to issues related to certification of the  
 17 putative class defined in Plaintiffs’ Complaint.

18 Second, the Request seeks documents related to written discovery served in  
 19 another matter that are not relevant to the claims and defenses in this case, and that  
 20 a search for such documents would not be proportional to the needs of this case. Fed.  
 21 R. Civ. P. 26(b). Even if the issues in another matter were relevant to the issues in  
 22 this case, the written discovery propounded by a party to that other matter would not  
 23 be relevant to any claim or defense in this case. Further, the Request seeks  
 24 documents related to written discovery in *International Medical Devices, Inc. et al.*  
 25 *v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) (“*Cornell*”), a civil  
 26 matter related to the misappropriation of trade secrets, copyright and trademark  
 27 infringement, and contractual claims, among other claims, that are not relevant here.



1 *Cornell* does not involve the issues here related to product- and marketing-related  
2 claims that Plaintiff alleges were false or misleading, and this case does not involve  
3 the contracts and interactions with the defendants in *Cornell* at issue there. See, e.g.,  
4 May 31, 2022 Order Denying Transfer Pursuant to General Order 21-01 (Doc. No.  
5 12) (finding that *Cornell* “is a misappropriation case against a doctor,” while this  
6 case “is a false advertising and unfair competition case filed by a class of medical  
7 patients against International Medical Devices, Inc.” and that “[t]he parties and  
8 claims of each case are dissimilar[.]”).

## 9 **2. Plaintiff’s Position**

10 Plaintiff’s position is that these documents are relevant to the safety and  
11 effectiveness of Penuma, which is within the scope of class certification discovery  
12 because Plaintiffs will use such evidence to show that class certification is proper  
13 because no reasonable consumer, properly informed, would purchase Penuma, and  
14 Plaintiffs will also use such evidence to show that the lack of any value to consumers  
15 from Penuma can be demonstrated on a class-wide basis. Furthermore, because these  
16 documents have already been collected and produced in related litigation, the burden  
17 of producing copies of them in this case is minimal. At the conference of counsel  
18 Plaintiff’s counsel offered to limit these Requests solely to trial testimony and  
19 deposition testimony and further offered that, to the extent any of these documents  
20 concern solely trade secret, copyright, or trademark matters that have no relevance  
21 to this action, Plaintiff would limit these requests to exclude such documents.  
22 Plaintiff’s counsel understood that defense counsel tentatively agreed either to  
23 confirm that the trial testimony and deposition transcripts had no information  
24 relevant to the safety or effectiveness of Penuma or to produce any portions of the  
25 transcripts relevant to these topics, but defense counsel failed to confirm this  
26 agreement in writing. Because Defendants’ objections to these requests are  
27

1 improper, the Court should strike Defendants’ objections and compel Defendants to  
2 produce the requested documents within 30 days.

### 3 **3. Defendant’s Position**

4 First, for the reasons set forth above, the Court should defer consideration of  
5 this issue while it considers Defendants’ Motion to Compel Arbitration.

6 Second, with respect to Defendants James J. Elist, M.D., a Medical  
7 Corporation, neither Plaintiffs’ pre-conference letter nor the argument above  
8 identifies any deficiency. That entity was not a party to and therefore has no  
9 documents to produce regarding *International Medical Devices, Inc. et al. v. Robert*  
10 *Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx). Its responses were not  
11 discussed at the parties’ conference. *See* L.R. 37-1 (requiring a moving party’s letter  
12 to “identify each issue and/or discovery request in dispute, state briefly as to each  
13 such issue/request the moving party’s position . . . [and] specify the terms of the  
14 discovery order to be sought.”). As such, issues related to this Defendant’s responses  
15 are not ripe.

16 Next, the objections of Defendants International Medical Devices, Inc., Dr.  
17 James Elist, and Menova International, Inc., are proper. Plaintiffs’ Requests seek  
18 documents and transcripts about a separate civil matter related to the  
19 misappropriation of trade secrets, copyright and trademark infringement, and  
20 contractual claims, among other claims, that are not relevant here. *Cornell* does not  
21 involve the issues here related to product- and marketing-related claims that Plaintiff  
22 alleges were false or misleading, and this case does not involve the contracts and  
23 interactions with the defendants in *Cornell* at issue there. *See, e.g.*, May 31, 2022  
24 Order Denying Transfer Pursuant to General Order 21-01 (Doc. No. 12) (finding that  
25 *Cornell* “is a misappropriation case against a doctor,” while this case “is a false  
26 advertising and unfair competition case filed by a class of medical patients against  
27 International Medical Devices, Inc.” and that “[t]he parties and claims of each case

are dissimilar[.]”). Further, motions *in limine* in *Cornell* specifically excepted “evidence, argument or testimony related to the surgical outcomes of Penuma penile implants, including the safety or removal of the implant...,” as well as evidence such as online blog posts and message board discussions related to Penuma patients. *See International Medical Devices, Inc. et al. v. Robert Cornell, MD, et al.*, No. 2:20-cv-03503-CMB (RAOx) at Doc. Nos. 588, 589. Simply put, these Requests are not limited to issues relevant to the claims and defenses in this case, much less class certification. *See* Fed. R. Civ. P. 26(b)(1).

Finally, Plaintiffs’ Requests for written discovery are even less relevant to the claims and issues in this case – what documents parties in a trade secrets case sought from one another in discovery has absolutely no bearing on Plaintiffs’ claims or Defendants’ defenses.

#### **D. Documents Regarding Dr. Elist’s California Board of Medicine Case**

##### **1. Discovery Requests at Issue**

The following requests, set forth below with Defendants’ responses, all concern documents related to the California Board of Medicine proceeding against Dr. James Elist related to the Penuma device.

**REQUEST FOR PRODUCTION No. 38 to Dr. James Elist:** All Documents submitted to You or received by You in connection with any Medical Board of California proceeding related to Penuma.

**AMENDED RESPONSE:** Defendant objects to this Request, for the following reasons.

First, the Request is not relevant to issues related to certification of the putative class defined in Plaintiffs’ Complaint.

Second, the Request seeks documents that are not relevant to the claims and defenses in this case, and that a search for such documents would not be proportional to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks

1 documents related to a state medical board proceeding that does not involve the  
2 issues here related to product- and marketing-related claims that Plaintiff alleges  
3 were false or misleading.

4 **REQUEST FOR PRODUCTION No. 39 to Dr. James Elist:** All  
5 Communications regarding any Medical Board of California proceeding related to  
6 Penuma.

7 **AMENDED RESPONSE:** Defendant objects to this Request duplicative of  
8 Request No. 38, and incorporates its responses and objections to Request No. 38 as  
9 if fully set out herein.

10 Defendant further objects to this Request to the extent it calls for the  
11 production of attorney-client privileged communications or work-product protected  
12 materials.

13 **REQUEST FOR PRODUCTION No. 38 to Dr. James J. Elist, M.D., a**  
14 **Medical Corporation:** All Documents submitted to You or received by You in  
15 connection with any Medical Board of California proceeding related to Penuma.

16 **AMENDED RESPONSE:** Defendant objects to this Request, for the  
17 following reasons.

18 First, the Request is not relevant to issues related to certification of the  
19 putative class defined in Plaintiffs' Complaint.

20 Second, the Request seeks documents that are not relevant to the claims and  
21 defenses in this case, and that a search for such documents would not be proportional  
22 to the needs of this case. Fed. R. Civ. P. 26(b). Specifically, the Request seeks  
23 documents related to a state medical board proceeding that does not involve the  
24 issues here related to product- and marketing-related claims that Plaintiff alleges  
25 were false or misleading.

1           **REQUEST FOR PRODUCTION No. 39 to Dr. James J. Elist, M.D., a**  
2           **Medical Corporation:** All Communications regarding any Medical Board of  
3           California proceeding related to Penuma.

4           **AMENDED RESPONSE:** Defendant objects to this Request as duplicative  
5           of Request No. 38, and incorporates its responses and objections to Request No. 38  
6           as if fully set out herein.

7           Defendant further objects to this Request to the extent it calls for the  
8           production of attorney-client privileged communications or work-product protected  
9           materials.

## 10           **2. Plaintiff's Position**

11           Plaintiff's position is that documents related to any California Board of  
12           Medicine proceeding related to Penuma are relevant to show that no reasonable  
13           consumer, properly informed, would purchase Penuma and that the lack of any value  
14           to consumers from Penuma can be demonstrated on a class-wide basis. The  
15           California Medical Board has accused Dr. Elist of misrepresenting Penuma's FDA  
16           approval status and of violating the standard of care in the medical community by  
17           offering surgical penile augmentation to patients whose dissatisfaction with their  
18           penises' appearance is purely psychological. Defendants have objected that the  
19           requested documents are not relevant. At the initial conference of counsel, Plaintiff's  
20           counsel offered that if Defendants were willing to stipulate that whether a reasonable  
21           consumer would purchase Penuma does not present any individual issues that would  
22           defeat the predominance of common issues for class certification purposes, Plaintiff  
23           would consider deferring these requests to the merits stage. Defendants have not  
24           agreed to so stipulate. At the conference of counsel following Defendants' amended  
25           response, Plaintiff's counsel offered that, to the extent the California Board of  
26           Medicine Case also concerns alleged acts of gross negligence and incompetence that  
27           are particular to individual cases, Plaintiffs are willing to narrow this request to

1 include only documents relevant to (1) whether Defendants misrepresented  
2 Penuma's FDA approval status; (3) whether the standard of care in the medical  
3 community includes offering surgical penile augmentation to patients whose  
4 dissatisfaction with their penises' appearance is purely psychological; and (3)  
5 whether any reasonable consumer, properly informed, would purchase Penuma.  
6 Plaintiff's counsel understood that Defendants' counsel would revert with a counter-  
7 proposal for narrowing these requests, but Defendants' counsel has not yet provided  
8 any such counter-proposal. Because Defendants' objections to these requests are  
9 unfounded and improper, the Court should strike the objections and compel  
10 Defendants to produce the requested documents within 30 days.

### 11 **3. Defendant's Position**

12 First, for the reasons set forth above, the Court should defer consideration of  
13 this issue while it considers Defendants' Motion to Compel Arbitration.

14 Next, Defendants' objections are proper. Plaintiffs' Requests seek all  
15 documents about a separate proceeding that are not relevant here. The California  
16 Medical Board proceeding does not involve the issues here related to product- and  
17 marketing-related claims that Plaintiffs allege were false or misleading, and this case  
18 does not involve the standard of care in the medical community for offering penile  
19 augmentation procedures to patients whose dissatisfaction with their penises is  
20 "purely psychological." These Requests are not limited to issues relevant to the  
21 claims and defenses in this case, much less class certification. *See* Fed. R. Civ. P.  
22 26(b)(1). Indeed, in their Opposition to Defendants' Motion to Compel Arbitration,  
23 Plaintiffs distinguish the negligence-related allegations raised in the Medical Board  
24 proceeding from their advertising- and marketing-related claims. *See* Dkt. 79 at 12–  
25 13.

1 **III. CONCLUSION**

2 The parties appreciate the Court's assistance in resolving their discovery  
3 disputes set forth above.

4  
5 Dated: October 4, 2023

Respectfully submitted,

6  
7 By: /s/ Michael A. Caddell

8 Michael A. Caddell (SBN 249469)

9 mac@caddellchapman.com

10 Cynthia B. Chapman (SBN 164471)

11 cbc@caddellchapman.com

12 Amy E. Tabor (SBN 297660)

13 aet@caddellchapman.com

14 CADDELL & CHAPMAN

15 628 East 9th Street

16 Houston, TX 77007-1722

17 Tel.: (713) 751-0400

18 Fax: (713) 751-0906

19 *Attorneys for Plaintiff*



1 By: /s/ Amir Nassihi

2 Amir M. Nassihi (SBN: 235936)

3 anassihi@shb.com

4 SHOOK, HARDY & BACON L.L.P.

5 555 Mission Street Suite 2300

6 San Francisco, California 94105

7 Tel.: (415) 544-1900

8 Fax: (415) 391-0281

9 Michael L. Mallow (SBN: 188745)

10 mmallow@shb.com

11 Mayela C. Montenegro-Urch (SBN:  
12 304471)

13 mmontenegro@shb.com

14 SHOOK, HARDY & BACON L.L.P.

15 2049 Century Park East, Suite 3000

16 Los Angeles, California 90067

17 Tel.: (424) 285-8330

18 Fax: (424) 204-9093

19 *Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I, Amy E. Tabor, hereby certify that on October 4, 2023 this document was filed with the Court using the CM/ECF system and thereby served on all counsel of record.

/s/Amy E. Tabor

Amy E. Tabor